

CHARITIES AND THE OHIO TAX LAWS

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Ohio's taxing system, like that of most states, is not really a system at all but a hodgepodge of constitutional provisions and statutes resulting from the demands for revenue and the pressures for exemption. For the purist seeking some consistency in the structure, however, there is some consolation in the almost universal tendency to relieve charities from some of the tax burdens. The traditional reason for granting favorable tax treatment to charitable organizations has been that their activities are in a field which otherwise might have to be occupied by governmental authority¹ but theories of what constitutes charity have varied from era to era. For instance, in the 1600's, charity included the encouragement of "marriages of poor maids; supplication and help of young tradesmen, handicraftsmen and persons decayed and ease of any poor inhabitants concerning payments of . . . taxes."² Ohio has never officially considered matrimonial efforts as charitable but the Ohio tax laws give varying degrees of preference to charitable organizations, running the gamut from the real estate tax to the excise on beer and wine. The purpose of this article is to show the present status of charities under each of Ohio's major taxes. The word "charities" has been used in its broadest sense to include any trust, organization or group having charitable purposes as defined in Section 368 of The Restatement of The Law of Trusts: "Charitable purposes include: (a) The relief of poverty; (b) the advancement of education; (c) the advancement of religion; (d) promotion of health; (e) governmental or municipal purposes; (f) other purposes the accomplishment of which is beneficial to the community."

REAL PROPERTY TAX

As the oldest revenue device of local government, the real estate tax has produced the largest body of case law relating to charitable organizations. Before examining the substantive law, however, the exemption procedure should be noted. Under the present law, the sole authority for exempting the real property of charities rests with The Board of Tax Appeals.³ Application is made on exemption forms provided by the county auditor who transmits the application to The Board of Tax Appeals. On the evidence presented with the application or after a hearing, the Board grants or denies the exemption and this decision is appealable by the

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¹ *Kendrick v. Farquhar*, 3 Ohio 189 (1837). Heisel, *Exemption from Taxation of Property Used for Religious, Educational, and Charitable Purposes In Ohio*, 3 UNIVERSITY OF CINCINNATI L. R. 40 (1929).

² Statute of Charitable Uses, 43 Eliz., c. 4 (1601).

³ Ohio Rev. Code §5703.02.

charity, the county auditor or any other party to either the Court of Appeals or the Supreme Court.⁴

In deciding real estate exemption cases, the Board and the courts have a line of precedents going back to the original Ohio Constitution. The Ohio Constitution of 1802 placed few restrictions on the legislature in the levying of real estate taxes or in the exempting of property from the tax. Article VIII, Section 3 of the Constitution was a very general expression to the effect that schools and the means of education should be forever encouraged. There was also a prohibition against the levying of poll taxes and a requirement of equal protection; except for these limitations, the legislature had a free hand in determining objects of taxation and exemption. Apparently, the legislature was thought to have abused the privileges granted to it under the Constitution of 1802,⁵ because in the 1851 Constitution severe limitations were placed upon the taxing authority of the legislature. Article XII, Section 2, of the new Constitution read as follows:

Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; also all real and personal property, according to its true value in money, but burying grounds, public schoolhouses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose and personal property, to an amount not exceeding in value Two Hundred Dollars for each individual, may, by general laws, be exempted from taxation; . . .

This made property the sole basis of taxation, required that taxes be assessed on all property except that specifically exempted, and further required that taxes be assessed on a uniform rule according to true value in money.⁶ In 1912 an amendment was made changing the phrase "institutions of purely public charity" to "institutions used exclusively for charitable purposes" but except for this amendment, no substantial change was made from 1851 until the so-called classification amendment was adopted in 1929. The stated object of the 1929 amendment was to provide a more flexible system of taxation for the State.⁷ Article XII, Section 2, was amended to provide for classification of property and to give the legislature broad discretion in the taxation of personal property, both tangible and intangible. After providing that certain bonds were to be exempt from taxation, the amended section read as follows:

. . . and without limiting the general power, subject to the provisions of article I of this constitution, to determine the subject and method of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public

⁴ Ohio Rev. Code §5717.04.

⁵ Exchange Bank v. Hines, 3 Ohio St. 1, 12 (1853).

⁶ *Id.* at p. 11.

⁷ House Joint Resolution No. 8, 88th General Assembly.

school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose . . .

There has been speculation that by the adoption of this amendment the power of the legislature to determine the taxability and the exemption of various types of property is now back to the status that it was under the original Constitution of 1802.⁸ The Ohio Supreme Court, however, does not agree that the 1929 amendment gave the legislature broad powers to exempt real property from taxation. The present law is stated in the syllabus of *Zangerle v. Cleveland* as follows:⁹

2. The power of the General Assembly to exempt real property from taxation is limited to the kind and classes enumerated in Section 2, Article XII, of the Constitution.

3. The power of the General Assembly to determine the subject and methods of taxation and exemption of personal property is limited only by Article I of the Constitution. (*State, ex rel, Struble, v. Davis et al Tax Comm.*, 132 Ohio St., 555 approved and followed.)

Exercising its constitutional authority, the legislature has enacted the following statutes:

Section 5709.01:

All real property in this State is subject to taxation except only as is expressly exempted therefrom . . .

Section 5709.12:

. . . real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempted from taxation.

Section 5709.07:

Public schoolhouses and houses used exclusively for public worship, the books and furniture therein and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit . . . shall be exempted from taxation . . .

In applying these statutory provisions within the limitations of the Ohio Constitution, the courts have been faced with two main problems: (1) Whether the activities of a particular organization are of such a nature and benefit a large enough group to be considered "charitable" (2) whether an institution carrying on activities which are concededly charitable in nature is using a particular parcel of property "exclusively" for charitable purposes. Since the real estate tax exemption depends upon the two-fold test of exclusive charitable use, it is not surprising that in some instances it is difficult to determine whether exemption was denied because the property owner was not engaged in activities which would be

⁸ Caren, *Constitutional Limitations on the Exemption of Real Property from Taxation*, 11 OHIO ST. L. J. 207, 210, 213 (1950).

⁹ 145 Ohio St. 347 (1945).

classed as charitable, or whether the activities were charitable, but not exclusively so.

One consideration in determining whether an institution is engaged in charitable activities is whether it is paid for its services. In one early case, *O'Brien v. Physicians' Hospital Association*,¹⁰ the Supreme Court stated that where a hospital was organized and operating as a charity, it would not cease to be a charitable organization merely by accepting payment from patients who were financially able to pay. In a later case,¹¹ the Court was faced with a fact situation involving a hospital not for profit which was, however, a private corporation. A number of doctors received a salary from the hospital, but their services were billed and paid through the hospital. The hospital showed a large net income after payment of expenses and in a four to three decision the Court said that the real property of the hospital was not exempt from taxation. In a 1945 case¹² exemption had been sought for a playground adjacent and belonging to a private school. Tuition to the school was determined according to the financial means of the child's family, but there was no evidence that there were any students who paid no fees. The Court placed some stress on the fact that the playground was open to the children in the neighborhood, cited the *O'Brien* case regarding the compensation received by the school and found that the playground was exempt from the real property tax. Two years later the *O'Brien* case was distinguished by the Court when it decided *Battelle Memorial Institute v. Dunn*.¹³ This case involved the real property belonging to Battelle Memorial Institute, a non-profit corporation organized under the will of Gordon Battelle "for the purpose of education in connection with the encouragement of creative and research work and the making of discoveries and inventions in connection with the metallurgy of coal, iron, steel, zinc and their allied industries." The evidence indicated that a substantial part of the Institute's activity consisted of sponsored research for which the Institute received compensation from the sponsoring company equal to the estimated cost of the research plus a percentage to cover overhead and other expenses. The Court distinguished the *O'Brien* case saying that in that instance it was the primary object of the hospital to render charity to those unable to pay, and that the amounts received from a number of pay patients were devoted to the primary and humanitarian object for which the hospital was established, whereas Battelle's research was primarily for the direct benefit of those for whom it was performed.¹⁴ Another interesting case involving the receipt of compensation

¹⁰ 96 Ohio St. 1, 116 N.E. 975 (1917).

¹¹ *Cleveland Osteopathic Hosp. v. Zangerle*, 153 Ohio St. 222, 91 N.E. 2d 261 (1950).

¹² *College Preparatory School for Girls v. Evatt*, 140 Ohio St. 114, 43 N.E. 2d 646 (1945).

¹³ 148 Ohio St. 53, 73 N.E. 2d 88 (1947).

¹⁴ *Id.* at 61.

by an institution applying for real property tax exemption under the charitable section of the statute is *Beerman Foundation v. Board of Tax Appeals*.¹⁵ The Beerman Foundation was a non-profit corporation furnishing low rent housing to disabled veterans of World War II. Apartments were furnished to qualified veterans at rentals which were admittedly less than half of the rate for comparable privately-owned apartments. The majority opinion of the Court states "... no living quarters are furnished free to any of the veterans occupying these apartments, and it is not claimed that the occupants are objects of charity".¹⁶ Following this reasoning, five members of the Court found that the real estate was not used exclusively for charitable purposes and exemption was denied.

Another facet of the charitable exemption question involves institutions whose charitable activities are not directed to the public generally, but are limited to a specified group. Prior to 1912, Article XII, Section 2, of the Ohio Constitution provided for exemption of the real estate of "institutions of purely public charity". In that year, however, the phrase was changed to "institutions used exclusively for charitable purposes . . ." There is evidence that the purpose of this constitutional amendment was to permit the legislature to exempt the property of charitable institutions which were not purely public in nature.¹⁷ Curiously enough, however, there are several cases decided after 1912 which seemingly deny exemption because the charitable activities of the institution involved were limited to a specific group. For instance, in *Bloch v. Board of Tax Appeals*,¹⁸ a unanimous Supreme Court held that a building used to house a denominational school engaged in the training of ministers was not "used exclusively for a charitable purpose" and was therefore not exempt from taxation where such a school was not open to the public generally. The problem was finally brought into the open in 1949 when the Supreme Court decided the *Cleveland Bible College* case.¹⁹ The facts involved were these: The Board of Tax Appeals had denied the real estate tax exemption application by the Cleveland Bible College after a hearing in which there was evidence that for admission to at least some of the courses of the College it was necessary that the student be a follower of the Christian religion. This requirement was at least one of the reasons for which the Board denied the exemption. A bare majority of the Supreme Court concluded that the Board's decision was

¹⁵ 152 Ohio St. 179, 87 N.E. 2d 474 (1949).

¹⁶ *Id.* at 181.

¹⁷ 2 Ohio Constitutional Convention 1912, p. 1880.

¹⁸ 144 Ohio St. 414, 59 N.E. 2d 145 (1945). See also *American Committee of Rabbinical College of Telshe, Inc. v. Board of Tax Appeals*, 148 Ohio St. 654, 76 N.E. 2d 719 (1947); *Society of the Precious Blood v. Board of Tax Appeals*, 149 Ohio St. 62, 77 N.E. 2d 459 (1948).

¹⁹ *Cleveland Bible College v. Board of Tax Appeals*, 151 Ohio St. 258, 85 N.E. 2d 284 (1949).

unreasonable and unlawful and that it should therefore be reversed. Two members of the majority based their decision on the fact that the school was in reality open to the public generally and that there was a misunderstanding as to the testimony regarding the admission of non-Christian students. The other two majority members, however, concluded that an institution used exclusively for the lawful advancement of education or religion or both is a charitable institution and that under the 1912 amendment of Article XII, Section 2 of the Constitution and the subsequent change in Section 5709.12 of the Revised Code, it was no longer necessary that such an institution be open generally to the public in order to have tax exemption of the property owned and used by it exclusively for such purposes. This four to three division in the Court on this particular question was further emphasized in the *American Committee of Rabbinical College of Telshe v. Board of Tax Appeals*²⁰ where the Court reversed an earlier decision and held that where real property was otherwise qualified for exemption, the fact that it was owned by a charitable institution not open generally to the public would not disqualify it for exemption.

As indicated earlier, mere ownership by a charitable institution will not automatically exempt a parcel of land from the Ohio real estate tax since the property itself must also be used exclusively for charitable purposes. Obviously, this means that rental real estate owned by a charitable organization is subject to taxation, even though the net rentals are used for charity.²¹ It is not so clear, however, what variations in property use can exist without the land losing its exempt status. For instance, when does real property acquired for exclusive charitable use become tax exempt? Will incidental commercial activity result in the property being taxed, and can the property be split vertically or horizontally to exempt only the portion used exclusively for charitable purposes?

There are several cases which have denied exemption to vacant real estate being held by charitable organizations intending to build on the property at a later date.²² The same result was reached when construction was in progress.²³ However, where an old church building was torn down and a new church erected within a reasonable time, the Supreme Court held that there was no loss of the tax exemption while the land was "vacant".²⁴ What seems to be a deviation in this line of cases, is found in *Good Samaritan Hospital Association v. Glander*.²⁵

²⁰ 156 Ohio St. 376, 102 N.E. 2d 589 (1951).

²¹ Benjamin Rose Institute v. Myers, 92 Ohio St. 252, 110 N.E. 924 (1915).

²² Ursuline Academy of Cleveland v. Board of Tax Appeals, 141 Ohio St. 563, 49 N.E. 2d 674 (1943); Orthodox Hebrew Board of Education v. Tax Commissioner, 155 Ohio St. 380, 98 N.E. 2d 834 (1951); Y.W.C.A. v. Spencer, 9 Ohio C. C. (N.S.) 351 (1907).

²³ Jones v. Conn, 116 Ohio St. 1, 155 N.E. 791 (1927).

²⁴ Application of Ohave Scholem Congregation, 156 Ohio St. 183, 101 N.E. 2d 767 (1951).

²⁵ 155 Ohio St. 507, 99 N.E. 2d 473 (1951).

In this case, a hospital acquired a house and barn for remodeling into a nurses' home. Though the repairs were not complete, and the buildings were not in use on tax listing date, the Court exempted the property by a 5 to 2 decision. Even more curious, in view of the usual rule that exemption statutes are strictly construed against the taxpayers,²⁶ is the statement by the majority of the Court that there was nothing in the record to show that the property had been used for non-charitable purposes during the repairs and hence it was exempt.

There have been a number of cases in which the Ohio Supreme Court has had to decide whether a given set of facts constituted exclusively charitable use of the particular property involved. The Court's approach to these cases can be illustrated by a series of four decisions involving printing plants owned by charities. Exemption was denied to the realty of a religious printing organization where 10% of the employees were engaged in commercial printing contracts which produced about 40% of the organization's profits.²⁷ The Court logically concluded that there was no exclusive charitable use of the property itself even though the profits went to disabled ministers, widows, and orphans. In *Gospel Worker Society v. Evatt*,²⁸ the record showed no evidence of commercial printing, but the Society did publish its own magazine for which it received some subscription payments. A majority of the judges apparently used this fact to deny exemption to the property belonging to the Society. A different result was reached where the property involved was a printing plant making only collection envelopes for the owner-church, and charging only its cost, plus a reserve against rising costs. Under these circumstances the property was held to be tax exempt.²⁹ This latter case was based on an earlier case, *American Issue Publishing Company v. Evatt*,³⁰ which granted tax exemption to the property of a non-profit corporation whose only activity was publishing temperance literature for the national organization which owned all of its stock.

A slightly different approach to the problem of exclusive charitable use was attempted in *Welfare Foundation v. Glander*³¹ where charitable organizations occupied all but two floors of an eleven-story building owned by one of the organizations. The lower two floors were rented to commercial enterprises, but the owner, Welfare Foundation, contended that the property could be split horizontally and the upper floors, which were devoted exclusively to charitable purposes, exempted from taxation. The Supreme Court, however, concluded that there was no authority for such split listing and that since the property was not used exclusively for charitable purposes, it was subject to taxation. This

²⁶ *Battelle Memorial Institute v. Dunn*, 148 Ohio St. 53, 73 N.E. 2d 88 (1947).

²⁷ *Zindorf v. Otterbein Press*, 138 Ohio St. 287, 34 N.E. 2d 748 (1941).

²⁸ 140 Ohio St. 185, 42 N.E. 2d 900 (1942).

²⁹ *Hubbard Press v. Glander*, 156 Ohio St. 170, 101 N.E. 2d 382 (1951).

³⁰ 137 Ohio St. 264, 28 N.E. 2d 613 (1940).

³¹ 146 Ohio St. 146, 64 N.E. 2d 813 (1945).

eventually resulted in the amendment of Section 5713.04 of the Revised Code to its present form which reads as follows:

. . . If a separate parcel of improved or unimproved real property has a single ownership, and is so used so that part thereof, if a separate entity, would be exempt from taxation, and the balance thereof would not be exempt from taxation, the listing thereof shall be split, and the part thereof used exclusively for an exempt purpose shall be regarded as a separate entity and be listed as exempt, and the balance thereof used for a purpose not exempt, shall, with the approaches thereto, be listed at its true value in money and taxed accordingly . . .

This section of the statute was considered in 1952 by the Supreme Court in *Goldman, a taxpayer, v. L. B. Harrison*,³² in a case in which The Board of Tax Appeals had found that 45% of the property involved was not used exclusively for charitable purposes. A majority of the Court, however, found that the section did not authorize the division of real property on a percentage basis, and that therefore the entire property involved was subject to taxation. In 1953 the Court concluded that the section authorizing split-listing would apply to a building which could be split according to floors³³ and finally in 1954 the Welfare Foundation itself was found to be exempt as to the floors involved in the earlier case.³⁴

Until the year 1952 the exemption of real property belonging to charitable organizations seemed to follow a fairly consistent pattern based upon the standard of exclusive use of the property for charitable purposes. In that year, however, the Supreme Court decided a group of seven cases³⁵ which seem to represent a change in approach even though the Court is apparently applying the same standard as before. All of the cases were instituted by the filing of a complaint by a Hamilton County taxpayer regarding certain real estate located in that county. The owners of all of the parcels of real estate were conceded by all parties to be charitable organizations, such as the Y.M.C.A. and Y.W.C.A. All of the organizations had an over-all program of a charitable nature, and all of them devoted sections of the buildings for dormitories, public cafeterias, restaurants and in some instances, bowling alleys, from which they received revenue to be used for the general charitable purposes of the organization. The Board of Tax Appeals found in each case that the building was not used exclusively for charitable purposes and further

³² 158 Ohio St. 181, 107 N.E. 2d 530 (1952).

³³ *Church of God v. Board of Tax Appeals*, 159 Ohio St. 517, 112 N.E. 2d 633 (1953).

³⁴ *Welfare Foundation v. Peck*, 160 Ohio St. 509, 117 N.E. 2d 1 (1954).

³⁵ *Goldman, A Taxpayer v. Y.M.C.A.*, 158 Ohio St. 185, 107 N.E. 2d 518 (1952).

found that it was impossible to split the listing by metes and bounds. The Board did attempt to make a percentage splitting of the building and to exclude from taxation that portion of the property used exclusively for charitable purposes. In the statement of the case by the Supreme Court, it is noted that most of the properties had never been taxed in earlier years. The Court reviewed many of the cases discussed previously in this article, and concluded that there was no need for a percentage split listing since the entire property was exempt. The syllabus of the case reads as follows:

Real property is used exclusively for charitable purposes and is exempt from taxation under Section 5353, General Code, (5709.12 Ohio Rev. Code) where it is owned and operated without profit by a charitable institution and by it devoted, as its main objective, to an overall program of social, religious and educational service to persons in peculiar need thereof, without distinction as to race, color or creed, even though as incidental to such objective, dormitory, dining room and other like services are furnished and a charge made therefor, the income therefrom being devoted to such program.

Judge Mathias wrote a short dissenting opinion in which he stated: "The decision in these cases ignores the long established precedent and adopts a new standard which is in itself vague, varying and uncertain. . . . Those claiming exemption need no longer show that the property is 'used *exclusively* for charitable purposes,' but only that such is *its main objective*."³⁶ Whether, as Judge Mathias has pointed out, a new exemption test has been created and whether it will have the effect of placing more property on the exempt duplicate, certainly has not yet been finally determined. It does seem fair to state however, that the Board of Tax Appeals is now faced with administering a less definite standard for exemption than existed prior to the decision of the Y.M.C.A. cases.

Up to this point we have treated churches as a part of a general group of charitable organizations. The Ohio Revised Code, however, provides for the exemption of their real estate under a separate section, 5709.07, which reads in part as follows:

. . . Houses used exclusively for public worship, the books and furniture therein, and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof, and not leased or otherwise used with a view to profit . . . shall be exempt from taxation.

The wording of the statute raises at least two special problems in the exemption of real estate belonging to churches. The first is whether there can be a split-listing of a building where part of it is used for non-religious purposes, such as a caretaker's apartment, and the second

³⁶ *Id.* at 203, 204.

is determining the extent to which grounds attached to a church are necessary for its proper occupancy, use and enjoyment.

In *Mussio v. Glander*³⁷ a three-story building had a ground floor used for church services and the second and third floors used for priests' and nuns' residences and the charitable work of the sisters. The Supreme Court found that the property was not used exclusively either as a church or for charitable purposes and that, therefore, it was subject to taxation. The Court further found that because there was no statutory authority at that time to split the listing of the property, it had to be considered as one parcel. In *Church of God v. The Board of Tax Appeals*³⁸ which we have discussed earlier, the Court in a similar situation permitted a split-listing and exempted the portion of the building used exclusively for church purposes. In that case, the dissent contended that under the Ohio Constitution and the statute, only *houses* used exclusively for public worship are exempt from taxation and that therefore there is no authority to split the property where the exemption is sought under what is now Section 5709.07 relating to church property.

There have been a number of cases considering when the property attached to the church building proper is necessary for its proper occupancy use and enjoyment. Residences of the priest, minister or rabbi have been held subject to tax even though they adjoin the church property.³⁹ In 1941 the Supreme Court found that a church parking lot owned by one church but used by another was convenient but not necessary for the use and occupancy of the owner-church and therefore was subject to taxation.⁴⁰ This case may be considered unusual in that the use and the ownership of the lot were in separate churches and also it was before the parking problem became as acute as it is at present time. In fact, the Board of Tax Appeals' records now indicate that church parking lots may be exempt where the facts seem to indicate that they are necessary to the use of the church building itself.

It is interesting to note the relationship of exempt property to taxable property throughout the state. On the assessed valuation of real property for 1955 tax duplicate, the total valuation of both taxable and exempt property was approximately sixteen billion dollars; of this amount, the total exempt property, including property owned by the United States, the State of Ohio, and the various political subdivisions as well as the property owned by charitable institutions was in excess of two billion dollars. As a percentage of the total property the exempt real estate amounted to 13.06%. Of this amount, about six hundred million dollars was represented by the assessed value of the property of privately-owned schools, colleges, charitable institutions, and churches. This means that

³⁷ 149 Ohio St. 423, 79 N.E. 2d 233 (1948).

³⁸ See *supra*, note 33.

³⁹ *Gerke v. Purcell*, 25 Ohio St. 229 (1874); *Watterson v. Halliday*, 77 Ohio St. 150, 82 N.E. 962 (1907).

⁴⁰ *Congregational Union v. Zangerle*, 138 Ohio St. 246, 34 N.E. 2d 201 (1941).

3.6% of the total assessed value of the real property in Ohio is owned by the charitable institutions that we have been discussing in this section.⁴¹ Obviously, these figures are nothing more than approximations since the assessed value of property in Ohio is not truly representative of the market value. Furthermore, any attempt to value some of the specialized property of charitable institutions is almost impossible, and once property is placed on the exempt list, little effort is made to revalue it on later appraisals.

TANGIBLE AND INTANGIBLE PERSONAL PROPERTY TAXES

The 1929 classification amendment to the Ohio Constitution relieved the General Assembly of the obligation to tax all personal property in Ohio. It also permitted the widest latitude in determining what types of personal property were to be taxed and what exemptions were to be granted. Realizing that the traditional personal property tax on jewelry, household goods and similar items produced many perjured pauper oaths but little revenue, the legislature chose to tax tangible personal property only when it was used in business. With minor exceptions, this theory is carried out by the following sections of the code:

Section 5709.01: . . . All personal property located and used in business in this state, and all domestic animals kept in this state, whether or not used in business, . . . are subject to taxation, regardless of the residence of the owners thereof. . . .

Section 5701.03: As used in Title LVII of the Revised Code, 'personal property' includes every tangible thing which is the subject of ownership, whether animate or inanimate, other than patterns, jigs, dies, or drawings, which are held for use and not for sale in the ordinary course of business, money, and motor vehicles registered by the owner thereof, and not forming part of a parcel of real property as defined in Section 5701.02 of the Revised Code; . . .

Section 5701.08: As used in Title LVII of the Revised Code: (A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, when stored or kept on hand as material, parts, products or merchandise . . . (B) 'Business' includes all enterprises conducted for gain, profit or income and extends to personal service occupations.

It should be noted that under the Ohio tax laws, the term "personal property" refers only to tangible property.

Even if the tangible personal property of a charity is used in busi-

⁴¹ These figures were compiled from information supplied by the Division of County Affairs of the Ohio Board of Tax Appeals.

ness in such a way as to be considered taxable under the sections quoted above, it may still be exempt from taxation under Section 5709.12: ". . . tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." The effect of all these sections is to require two conditions to be met before an Ohio charity's personal property is subject to taxation. First, the property must be "used in business" as defined in the law and second, the personalty must not be used exclusively for charitable purposes under Section 5709.12. Since the burden of proof is normally on the taxing authorities to show that property is subject to taxation and on the taxpayer to show that property is entitled to exemption, it is possible to conceive of some fine distinctions of proof involved in such cases, but in actual practice, there has been little litigation in this field. The landmark decision is *American Jersey Cattle Club v. Glander*⁴² the syllabus of which reads as follows:

1. The fact, that a corporation is organized and operated as one not for profit, does not mean that its enterprises may not be conducted for gain, profit or net income to the corporation as a legal entity apart from its members.
2. In determining whether the activities of a nonprofit corporation constitute enterprises conducted for gain, profit or net income, it is proper to consider the history of such corporation.
3. The activities of such a corporation constitute enterprises conducted for gain, profit or net income where it appears that:
 - (a) those activities have resulted in the accumulation by the corporation over a period of years of substantial surplus funds,
 - (b) the corporation has had a substantial surplus of revenues over expenditures from those activities during the preceding year, and
 - (c) the corporation admittedly regards such a surplus as essential for expansion of its activities.
4. An organization's promotion of the use of a trade-mark in sales by others of a competitive commercial product and its furnishing of advertising matter to stimulate such sales are activities which prevent such organization from being considered as one operated *exclusively* for charitable, scientific, educational or public purposes.

The American Jersey Cattle Club was a non-profit corporation organized for the purpose of improving breeding of Jersey cattle in the United States. It maintained a written register for the cattle and conducted activities to promote the breed. The club also owned a trade-mark from which it received royalties. The Tax Commissioner assessed the tangible personal property belonging to the club pursuant to Rule No. 213 of the Department of Taxation, the first paragraph of which read as follows:

⁴² 152 Ohio St. 506, 90 N.E. 2d 433 (1950).

Tangible personal property of nonprofit organizations shall be deemed 'used in business' and, therefore, subject to tax, when such property is used in connection with customary activities of such organizations for the use and enjoyment of which a special rate or charge is imposed, whether or not the income so derived be accumulated or disbursed in connection with the other activities of such organizations . . .

After reviewing the operations of the club, the Supreme Court concluded that the Tax Commissioner's rule was not inconsistent with any provision of law, and that the property was used in business within the meaning of the statute. The Court further found that since the club was being operated in part for the purpose of encouraging the expansion of markets of Jersey milk, it was not operated "exclusively" for charitable, scientific, educational or public purposes and therefore the property was not exempt. Where, however, the commercial aspects of the trademark promotion are absent and where the primary function of an organization seems to be education and promotion of arts and sciences, even though limited to a particular field, tangible personal property belonging to the organization may be exempt from taxation.⁴³

In *Lutheran Bookshop v. Bowers*⁴⁴ a nonprofit corporation owned a bookshop near downtown Toledo, selling Bibles, literature, books, greeting cards, stationery and religious materials for the use of churches, Sunday schools and the general public. The shop advertised in the newspapers, radio and other media and all sales were made above cost. On these facts, the Supreme Court found the personal property owned by the shop was used in business and subject to taxation. It further found that it was not used exclusively for charitable purposes and hence was not exempt under Section 5709.12.

There are three courses that a charitable organization may follow in returning its tangible personal property for taxation. (1) It may make no return of the property at all on the assumption that it is not used in business. If the Tax Commissioner later determines that the property is used in business and it is not used exclusively for charitable purposes, the organization may be subject to penalties.⁴⁵ (2) File blank returns showing no property used in business and force the Tax Commissioner to make a determination. (3) File an application in the Board of Tax Appeals for exemption of the property as used exclusively for charitable purposes. In theory, at least, the third alternative might be considered as an admission that the property was used in business and therefore *prima facie* subject to taxation.

Turning to intangible personal property, we find that it is subject

⁴³ *In re American Ceramic Society, Inc., Board of Tax Appeals*, October 13, 1952.

⁴⁴ 164 Ohio St. 359 (1955).

⁴⁵ Ohio Rev. Code §5711.27.

to taxation in Ohio, whether it is used in business or not. Section 5709.02 provides: "All money, credits, investments, deposits and other intangible property of persons residing in this state shall be subject to taxation, except as provided in this section or as otherwise provided or exempted in Title LVII of the Revised Code: . . ." This means that securities belonging to a charity would be taxed except for Section 5709.04: "Money, credits, investments, deposits and other intangible property belonging, either legally or beneficially, to corporations, trust associations, funds, foundations, or community chests, organized and operated exclusively for religious, charitable, scientific, literary, health, hospital, educational, or public purposes, exclusively for the prevention of cruelty to children or animals, or exclusively for contributing financial support for any such purposes, no part of the net earnings of which inures (inures) to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation, shall not be subject to taxation." This section provides a liberal exemption for intangible personal property belonging to charitable organizations and is a direct copy of the federal statutes providing for exemption from federal income, estate and gift taxes.⁴⁶ Prior to the adoption of Section 5709.04 in 1945, the Ohio Supreme Court had ruled that the investments belonging to a charitable organization were subject to taxation.⁴⁷ When the statute was originally enacted, the Board of Tax Appeals held that it had original jurisdiction to exempt intangible personal property from taxation.⁴⁸ Later the Board expressly overruled this decision and concluded, perhaps not unmindful of the thousands of applications for exemption, that the section was not an exemption statute but merely defined when certain property was subject to taxation and was, therefore, within the jurisdiction of the Tax Commissioner.⁴⁹

In view of the statutory language of Section 5709.04 referring to property belonging "either legally or beneficially" to charitable organizations, it would seem that investments in the hands of an executor for ultimate distribution to the charity, should be excluded from taxation. This question was raised during the period when the Board of Tax Appeals was considered to have the exclusive jurisdiction for exempting intangible property.⁵⁰ In a very brief opinion the Board found that to

⁴⁶ Internal Revenue Code of 1954, §§501(c), 170(c), (income tax); 2055(a) (estate tax); 2522 (a)(b) (gift tax). These sections were taken, with minor changes, from the Revenue Code of 1939.

⁴⁷ *The Wehrle Foundation v. Evatt*, 141 Ohio St. 467, 49 N.E. 2d 52 (1943).

⁴⁸ *In re Cleveland Memorial Medical Foundation*, 54 Ohio L. Abs. 88, 83 N.E. 2d 829 (1948).

⁴⁹ *In re Battelle Memorial Institute*, 60 Ohio L. Abs. 405, 99 N.E. 2d 99 (1951).

⁵⁰ *In re Application of Estate of Charles H. Woodward*, Board of Tax Appeals No. 15579.

the extent the intangible property held by the executor exceeded the amount of the debts and claims payable out of the estate, it was exempt from taxation if the intangibles would eventually pass to an exempt organization.

INHERITANCE TAX

The Ohio Inheritance Tax is in the nature of an excise tax on the right to receive property of a decedent⁵¹ or, in the case of the additional tax levied to take advantage of the 80% credit under the Federal Estate Tax,⁵² the right to transmit property from the estate.⁵³ The present inheritance tax law was enacted in 1919 and follows the pattern permitted by Article XII, Section 7 of The Ohio Constitution, levying a tax at increasing rates on larger inheritances and those from distant relatives or strangers. The exemption of successions of property to certain types of charities is provided in Section 5731.09 of the Revised Code:

The succession to any property passing to or for the use of . . . any public institution of learning or any public hospital not for profit, within this state, or any institution of learning or any public hospital not for profit within any state of the United States, which state does not impose an inheritance, estate, or transfer tax on property given, devised, or bequeathed by a resident thereof to an institution of learning, or any public hospital not for profit, within this state, or to or for the use of an institution for purposes only of public charity, carried on in whole or in a substantial part within this state, or to an institution or organization not for profit whose exclusive purpose is printing and distributing the Bible, shall not be subject to Section 5731.02 of the Revised Code . . .

Several facts are apparent from reading the statute: successions from an Ohio decedent may be taxable if they pass to a charity located or incorporated in a state which does not provide for reciprocal exemption of gifts to an Ohio charity; an Ohio institution of learning must be "public" to receive a tax-free inheritance but a similar body in a reciprocal state need not be "public". Some other facets have been developed by court decisions.

Considering the exemption for gifts to institutions of learning, it has been held that the mere publishing of books is not operating an educational institution.⁵⁴ Also, where the educational work of an organization is subsidiary to its religious and missionary endeavors, exemption will be denied.⁵⁵ Where there is an actual school offering seminary and pre-seminary training, open to all persons meeting certain entrance standards,

⁵¹ State ex rel. Taylor v. Guilbert 70 Ohio St. 229 (1904).

⁵² Ohio Rev. Code §5731.13.

⁵³ 1932 Ohio Atty. Gen. Ops. No. 4551.

⁵⁴ *In re Estate of Taylor*, 139 Ohio St. 417, 40 N.E. 2d 936 (1942).

⁵⁵ *In re Estate of Osborn*, 159 Ohio St. 63, 110 N.E. 2d 791 (1953).

gifts to the school will be exempt even though it is not publicly maintained.⁵⁶ Where the bequest to the institution limits its benefits to a certain group of students, such as those in the theological school, it may still qualify for exemption.⁵⁷

Two problems arise in interpreting the portion of Section 5731.09 relating to institutions for purposes only of public charity: (1) what institutions fall within this class and (2) when are their activities "carried on in whole or in a substantial part" in Ohio? Answering the second question, the courts have found that where one-forty-eighth of the American Humane Educational Society's expenditures were in Ohio, it was a substantial part.⁵⁸ In *In re Estate of Oglebay*,⁵⁹ the trustees could spend no more than fifty percent of the income and principal of a trust for public charity in West Virginia and the remainder was to be used for public charitable purposes in Ohio. The Department of Taxation contended that the tax should apply to the one half that might be expended out of the state. The Supreme Court held that the bequest to the trustees was a single succession and was exempt from tax because a substantial part was required to be spent in Ohio.

The Department of Taxation has considered gifts to many organizations exempt for purposes only of public charity, including the Y.M.C.A., Y.W.C.A., Red Cross, Community Chest, orphanages, homes for the aged, historical societies and art museums. However, the Department, attorneys and text writers⁶⁰ have stated unequivocally that general religious gifts are not exempt, even though there has been no direct statement by the Supreme Court on such a gift. The most definitive statements until recently were that exemption as an institution of learning was precluded where religious activities dominated educational endeavors⁶¹ and that a bequest for the saying of masses for the repose of the soul of a decedent was subject to taxation.⁶² There are a number of lower court decisions taxing gifts for religious or combined religious and charitable purposes, including a gift to the Salvation Army.⁶³ On December 19, 1956 the Supreme Court decided *In re Estate of Seaman*,⁶⁴ the syllabus of which reads:

1. Charitable purposes include religious purposes.
2. An institution organized and conducted for charitable purposes is an institution for purposes of public charity if its

⁵⁶ *In re Estate of Lambert*, 69 Ohio App. 522, 44 N.E. 2d 325 (1940).

⁵⁷ *In re Estate of Whiting*, 34 Ohio Abs. 207, 21 Ohio Op. 55 (1938).

⁵⁸ *Tax Commissioner v. American Humane Society*, 42 Ohio App. 4, 181 N.E. 557 (1931).

⁵⁹ 162 Ohio St. 1, 110 N.E. 2d 792 (1954).

⁶⁰ DEIBEL, OHIO PROBATE LAW 578 (5th ed. 1954).

⁶¹ Note 55, *supra*.

⁶² *In re Estate of Shanrahan*, 159 Ohio St. 487, 112 N.E. 2d 665 (1953).

⁶³ *In re Estate of Weld*, 71 Ohio App. 497, 50 N.E. 2d 275 (1942).

⁶⁴ *In re Estate of Seaman*, 166 Ohio St. 51, 139 N.E. 2d 17 (1956).

benefits are open and available to the public generally.

3. If the benefits of an institution organized and conducted for religious and other charitable purposes only are open and available to the public generally, such institution is an institution for purposes only of public charity within the meaning of those words as used in Section 5334, General Code (Section 5731.09, Revised Code).

Thus, four members of the Court held that a bequest to the Salvation Army was exempt from inheritance tax. Two judges joined Judge Zimmerman in a dissenting opinion in which they hinted that the majority might be accused of "judicial legislation".⁶⁵ Based on the *Seaman* case, the Department of Taxation seems bound to exempt gifts to organizations engaged solely in religious and charitable activities for the general public but the question of exemption of a purely religious bequest apparently remains to be litigated in the Supreme Court.

Estate planners should consider several other aspects of charitable gifts under the inheritance tax. Gifts to non-charitable organizations may be tax-exempt if the use of the gift is restricted to exempt purposes⁶⁶ and conversely, gifts to a charity giving discretionary powers to apply the property to private persons or to out-of-state activities may be taxable.⁶⁷ Also, a bequest limiting the benefits to a small group may be considered too narrow to be public charity.⁶⁸ Section 5731.06 exempts the proceeds of life insurance payable on the insured's death unless paid to the insured's estate. By making a church or other non-exempt institution the beneficiary of his life insurance a decedent can transfer this property free of inheritance tax.

SALES AND USE TAX

A depression baby that grew to a multi-million dollar maturity, the Ohio sales and use tax is now the primary source of revenue for the state government. The tax is on the retail sale of tangible personal property to the consumer and is at a three percent rate collected on a bracket system. The law excludes several types of transactions from the definition of "retail sale"⁶⁹ and exempts eighteen kinds of retail sales from the tax.⁷⁰ The only exclusion of direct interest to charities relates to sales for resale.⁷¹ No tax applies to any sale the purpose of which is to

⁶⁵ *Id.* at 62.

⁶⁶ *In re Estate of White*, 23 Ohio N.P. (n.s.) 574 (1922).

⁶⁷ *Tax Comm. v. Paxson*, 118 Ohio St. 36, 160 N.E. 468 (1928). *In re Estate of Bremer*, 166 Ohio St. 233 (1957).

⁶⁸ *Tax Commissioner v. Bank and Trust Co.*, 117 Ohio St. 443, 159 N.E. 570 (1927).

⁶⁹ Ohio Rev. Code §5739.01.

⁷⁰ Ohio Rev. Code §5739.01(B).

⁷¹ Ohio Rev. Code §5739.01(E)(1).

resell the article in the same form as received. The exemptions applicable to charitable organizations are in Subsection B of Section 5739.02

. . . (10) casual or isolated sales by a vendor not engaged in the business of selling tangible personal property except as to such sales of motor vehicles and house trailers; . . . (14) sales of tangible personal property to charitable and religious organizations; . . .

The casual sale exclusion points up the difference in treatment, for sales tax purposes, of sales *by* charitable and religious organizations and sales *to* them. Regardless of the purpose, sales to a charity are exempt from tax. Where, however, churches, schools, foundations and similar institutions regularly engage in selling tangible personal property, including meals, such sales are taxable to the consumer and the organization must apply for a vendor's license, collect the tax and remit it to the State of Ohio.⁷² The Attorney General has given an opinion that sales of food and other articles by ladies aid societies and similar organizations affiliated with churches are usually casual and isolated sales.⁷³ The Tax Commissioner has adopted Rule No. 57 in an attempt to draw an administrative line between casual and non-casual sales; it reads: "Charitable and religious organizations which sell tangible personal property including meals, and conduct more than four such sales per year, are not making casual or isolated sales within the meaning of the sales tax law and must, therefore, obtain vendors' licenses and collect the sales tax upon all sales." The Commissioner's Rule No. 58 requires all organizations making non-casual sales to procure licenses, except public and parochial schools serving cafeteria meals or selling school supplies not as a business and without profit.

The exemption of sales to charitable and religious organizations is administered under the above Rule No. 58 which requires ". . . the dominant functions of the organization must be of a charitable or religious character, and the income of the organization must be devoted to said activities and functions, and not inure to the benefit of any private stockholder or individual." In doubtful cases the Department of Taxation will require the organization to submit a copy of its purpose clause and a statement of recent receipts and disbursements.⁷⁴ The Board of Tax Appeals has exempted sales to the Oberlin College Alumni Association⁷⁵ but sales to Battelle Memorial Institute, the research organization discussed earlier in the real estate tax section of this article, were held to be taxable.⁷⁶ The Department of Taxation issues a list of exempt

⁷² 1938 Ohio Atty. Gen. Ops. No. 2368.

⁷³ 1936 Ohio Atty. Gen. Ops. No. 873.

⁷⁴ Circular, Ohio Department of Taxation, June 1, 1953.

⁷⁵ Oberlin College Alumni Association v. Peck, Ohio Board of Tax Appeals, No. 26337, August 31, 1954.

⁷⁶ Battelle Memorial Institute v. Glander, Ohio Board of Tax Appeals, September 10, 1951.

charities but there is no requirement for registration and the list is far from complete. Any vendor who, in fact, makes a sale to any charitable or religious organization may consider the sale exempt from tax but presumably he would have the burden of proving the exemption upon audit.⁷⁷

Construction contracts under which a contractor builds or repairs a building for a church or charity present a unique sales tax problem. Under the law, where the contract price is stated as lump sum covering both labor and materials, the contractor makes no "sale" for the lump sum but is considered the consumer of the materials, which are subject to sales tax when purchased.⁷⁸ If the contract or the billing breaks down the items of material and labor, the contractor is considered to be selling the materials and the owner bears the sales tax. Thus, if a religious or charitable organization contracts for construction in a "break down" contract all materials will be purchased free of sales tax but if the contract is on a lump sum basis, the contractor will be subject to tax on the items used.⁷⁹

Ohio charities receive not only the indirect benefit of tax exemption but may also obtain the direct benefit of cash payments for helping the state collect its taxes. No church group or women's club is complete without a committee whose chairman exhorts the members to hoard the stamps that evidence payment of the sales tax. Section 5741.08 of the Revised Code provides that health, welfare, charitable, religious, educational, fraternal and patriotic organizations in existence on December 31, 1938, may present cancelled sales tax stamps for redemption at the rate of three percent of the face value of the stamps redeemed. Other organizations and private individuals may redeem stamps at the same rate by presenting evidence that they have assisted the state in the collection of the tax. The "evidence" is usually a statement that the persons collecting the stamps have insisted that the vendors cancel them on all taxable sales. Sales tax redemption has resulted in payments to Ohio organizations and individuals amounting to almost \$41 million from June 1939 to June 1956 and in recent years about 70 percent of the issued stamps have been redeemed.⁸⁰

MINOR TAXES

Franchise Tax—All charities organized as corporations, either for profit or non-profit, are subject to the Ohio Corporation Franchise Tax, unless

⁷⁷ *Leakas Furriers v. Bowers*, 98 Ohio App. 337, 129 N.E. 2d 478 (1954).

⁷⁸ *Ornamental Iron Work Co. v. Peck*, 160 Ohio St. 399, 116 N.E. 2d 577 (1953).

⁷⁹ *Joseph A. Clemente v. Glander*, Ohio Board of Tax Appeals, No. 19211, May 28, 1951; *Wagner-Smith v. Glander*, Ohio Board of Tax Appeals, No. 16165, November 9, 1949.

⁸⁰ *Bulletin*, Ohio Department of Taxation, Division of Research and Statistics, July 20, 1956.

under the jurisdiction of the Superintendent of Insurance.⁸¹ The minimum tax is twenty-five dollars per year.⁸²

Gasoline Taxes—No exemptions specially applicable to charities.

Cigarette Taxes—No exemptions specially applicable to charities.

Alcoholic Beverage Taxes—Wine for known sacramental purposes is exempt from the wine tax levied by Section 4301.43 of the Revised Code.

Financial Institutions Taxes—The tax on the deposits of financial institutions exempts the deposit of an "institution used exclusively for charitable purposes"⁸³ but since this tax is customarily absorbed by the banks it has no direct effect on charitable organizations.

CONCLUSION

Traditionally, a law review article ends with a ringing defense or denunciation of the legal mechanism studied. Ohio's tax treatment of charities is not susceptible to such a definite stand, if for no other reason than lack of information. No one knows the effect of charitable exemptions on the state, the charities or the private individual. Assuming the correctness of the premise that charitable organizations are entitled to favorable tax treatment because they perform functions that might otherwise be a governmental responsibility, Ohio's tax laws seem to operate fairly consistently. There is a tendency in the statutes and the administration to limit exemptions to institutions clearly charitable in nature and to deny tax favors where charities are in competition with business and industry. Unless the basic premise is changed or there is a major study of the economic effect of exemptions, no crusade for or against the charities seems imminent.

⁸¹ Ohio Rev. Code §§5733.01 and 5733.09.

⁸² Ohio Rev. Code §5733.06.

⁸³ Ohio Rev. Code §5725.03(c).